

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Student v.
Brockton Public Schools

BSEA # 1301082

RULING ON MOTION TO DISMISS

This ruling is issued pursuant to the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the state special education law (M.G.L. c. 71B), the state Administrative Procedure Act (M.G.L. c. 30A), and the regulations promulgated under these statutes.

The issue before me is whether parts of Parents' claims/ issues against Brockton Public Schools (Brockton) should be dismissed or limited. Brockton also requests a determination as to the scope of the Hearing.

PROCEDURAL BACKGROUND

On November 6, 2012, Brockton filed a *Motion to Dismiss/In Limine and to Determine the Scope of the Hearing* and supporting Memoranda. Brockton takes the position that: a) Parent is estopped from relitigating claims/ issues that have been fully litigated in previous BSEA administrative proceedings between the parties (i.e., *BSEA #11-3408* and *BSEA #12-4761*); b) that Parent failed to comply with the BSEA instruction on September 10, 2012, that she file a written statement clarifying the "current" issues which she was seeking for the BSEA to address. The case is scheduled to proceed to Hearing on November 28 and 29, 2012 and as such clarification of the issues to be heard is essential.

On November 13, 2012, Parent filed an opposition to Brockton's motion entitled *Motion to Dismiss Brockton's Motion to Dismiss/In Limine and to Determine the Scope of the Hearing* as well as a request for postponement of the Hearing scheduled on September 25, 2012 for November 28 and 29, 2012 at the BSEA in Boston, MA.¹ Parent attached several documents to her motion including several emails, a physician's note, two U.S. Marshall's notices of service dated November 7, 2012, a copy of her request for hearing in the instant case, a list of transportation and reimbursement request dated June 12, 2012, two separate copies of Mapquest calculating the distance between Parent's home and Eagleton School; Massachusetts Turnpike toll receipts, two letters from Parent to Olga Garriga dated May 23, 2012 and June 19, 2012, a Department of Education Assignment of School District

¹ In her Motion Parent mentions her desire to join DYS but no motion for joinder of DYS was attached. I note that her other submissions provide a rendition of claims against DYS that were already addressed in *BSEA #11-3408*. As such, the Hearing will proceed against Brockton only.

Responsibility dated October 20, 2010, and a copy of 34 CFR 300.530 of the IDEA regulations.²

In her opposition, Parent states that her Request for Hearing included the procedural violations including violation of the IEP development process, denial of FAPE to Student, withholding of special education services (e.g. failure to reimburse Parent for transporting Student for home visits while at Eagleton), failure to include family counseling as a service in Student's IEP. Parent concedes that during a telephone conference call between the Parties and the Hearing Officer, the Hearing Officer instructed Parent to take a look at a previous Ruling/ Decision which Parent had received, and make a list of claims that occurred following issuance of the Decision and/ or which were not addressed by previous BSEA Rulings/ Decisions and that Parent should then submit a new list of any current claims and/ or alleged violations. Parent reasoned that the instructions imparted during the telephone conference call were suggestions rather than orders because the Hearing Officer did not specifically order Parent to do so in the Order setting the Hearing date issued after the telephone conference call.³

Parent further states that she has filed a Civil Action in District Court against the BSEA for due Process violations in BSEA #11-3408 and that Brockton should not rely on rulings issued in error by a previous Hearing Officer. Parent argued that she should not be forced to limit the scope of the hearing or timeline. Parent asserts that the Hearing Request is clear and she wishes to present her case without being prejudiced by limitations to the scope of the Hearing.

Lastly, Parent filed a request for postponement of the Hearing until after December 15, 2012, due to the fact that Parent's daughter's father was injured at work and is scheduled to have surgery on his foot on November 15, 2012. Thereafter, he will be incapacitated for up to thirty (30) days. Parent asserts that she will be responsible to provide before and after school transportation to her daughter. Also, Parent states that she has three dogs that required to be walked every four (4) hours preventing her from spending the whole day at a hearing in Boston, MA.

The official record of the motion consists of Brockton's Motion and Memorandum, and Additionally, I have taken administrative notice of BSEA #11-3408 and BSEA #12-4761.

² These documents had been previously submitted as part of Parent's Request for Hearing in the instant case.

³ "... The parent POA [Power of Attorney] received an order after the conference call from Hearing Officer Figueroa which did not include an order to address any clarification of the parent's original Hearing Request. The Hearing Officer did ask the parent during the conference call to take a previous ruling [/ decision] which the parent received and start from that point and write a narrative or list of complaints or procedural violations that transpired after ruling that the parent felt warranted for this Hearing. The parent POA did not complete the task as this was not a written order and merely a suggestion the parent interpreted and both parties received a written order after the conference call and this was not in the written order. I assumed it was not necessary after POA [Parent] reviewed order and there was no written request for clarification and parent reviewed original request for Hearing which was not vague or ambiguous and the claims were supported by emails and documentation, therefore, I assumed the Hearing Officer reread the original request for Hearin." Parent's *Motion to Dismiss the Brockton Public Schools Motion to Dismiss/ in Limine and to Determine the Scope of Hearing*.

FACTUAL BACKGROUND

The following facts are not in dispute:

1. Student is an individual with a disability, falling within the purview of the IDEA⁴ and the Massachusetts special education statute.⁵ He is a nineteen year-old resident of Brockton, MA and therefore, Brockton is responsible for his education. Brockton first became responsible for Student's education on or about October 2010.
2. Parent filed her request for Hearing in the instant case on August 22, 2012 and filed an amended request on September 5, 2012. No further clarification of issues and or claims has been made thereafter.
3. At the time of Parent's filing of the Hearing Request Student's whereabouts were unknown.
4. A Conference Call between the Hearing Officer and the Parties was held on September 10, 2012. The purpose of the call was to ascertain the status of the case and issues to be decided since the BSEA had issued two Decisions covering the period from October 2010 to June 2012⁶. During the call, Parent was instructed to clarify her claims as of August 2012 given that multiple issues of fact and law had been addressed in *BSEA #11-3408* and *BSEA #12-4761*.
5. The issues in *BSEA #11-3408* included:
 - a. Whether [Department of Youth Services] DYS impermissibly caused Brockton and/ or SEIS to be unable to provide Student with FAPE.
 - b. Whether the educational service providers who provided services to Student possessed the appropriate licensing as required by the IDEA and ch. 71B.
 - c. Whether the IEP proposed by Brockton for the period from November 17, 2010 through November 17, 2011 was reasonably calculated to provide Student with a FAPE in the LRE.
 - d. Whether Brockton denied Student FAPE by removing previously accepted services from the previously drafted and accepted IEP without performing evaluations.
 - e. Whether Brockton denied Parent the opportunity to participate in the drafting of the IEP for the period from November 17, 2010 through November 17, 2011.

⁴ 20 U.S.C. § 1400 *et seq.*

⁵ MASS. GEN. LAWS ch. 71B.

⁶ The Decision issued in June 2012 on *BSEA #12-3761* was issued by me following a two-day Hearing. The Decision in *BSEA #11-3408* was issued by Hearing Officer Catherine Putney-Yaceshyn.

- f. Whether Student's last accepted IEP has been implemented by Brockton and or SEIS to the extent that it may be implemented in the DYS facility where he is being detained.
6. The Hearing Officer in *BSEA #11-3408* found that Parent had failed to meet the burden of proof with respect to any of the issues brought forth by her and declined to award any relief. Specifically as to Brockton, she found that the IEP promulgated for the period from November 17, 2010 through November 17, 2011 was reasonably calculated to offer Student a FAPE in the LRE and also found that Brockton's removal of clinical services from Student's IEP was not due to any determination that Student no longer required clinical services but rather the result of Brockton's limited authority given its "reasonable interpretation of 603 CMR 28.06(9)". Similarly, she found that Parent did not produce any evidence to support a finding that Student had suffered any harm as a result of removal of any clinical services. Instead, she found that although not included in the IEP, Westboro had provided Student with over forty-five minutes per week of individual therapy, DBT, and group therapy while Student had been at Westboro. The Hearing Officer also found that Parent had failed to present any evidence to support a finding that Brockton had denied Parent the opportunity to participate in the drafting of the IEP for the period from November 17, 2010 through November 17, 2011.
7. *BSEA #12-4761* addressed:
 - a. Whether Brockton conducted the transition assessment necessary to initiate Student's transition services;
 - b. Whether Brockton was responsible to fund an independent transition services evaluation comprising an independent living skills/ functional living skills evaluation, an academic evaluation, and forensic evaluation of Student;
 - c. Whether Brockton violated Student's procedural due process rights by failing to conduct its evaluations and by failing to respond to Parent's request for independent evaluations in a timely manner.
8. Brockton was found to have met its legal obligation regarding the district's evaluations of Student including the transition services assessment (with the exception of the observations in the home and the community) which was found to be appropriate. Additional evaluations/ assessments had also been conducted by Eagleton School staff while Student was placed at that school. Further assessment of Student's math level was found to be necessary and Brockton was allowed to dispense with the requirement of written parental consent to complete the necessary evaluations. The Decision further noted Parent's continued entitlement to an independent neuropsychological evaluation, an academic evaluation, and an occupational therapy evaluation, at Rate Setting rates, as previously agreed by Brockton. She however was not found to be entitled to a forensic evaluation of Student. The Decision also noted Student's entitlement to an independent life-skills/

functional living skills evaluation as requested by Parent. In general, procedural issues were decided in favor of Brockton.

9. In *BSEA #12-4761* Brockton was ordered to conduct observations of Student in the home/ community as part of its transition assessment (something it had not been able to complete due to Student's unavailability at the time of the assessment); conduct any necessary assessment to ascertain Student's functional levels in mathematics; convene Student's Team to discuss the result of the transition services evaluation conducted by Eagleton School; and if Parent so desired, fund an independent life-skills/ functional living skills evaluation of Student that is appropriate for his aptitude level. Additionally, Parent's right to an independent neuropsychological evaluation, an academic and an occupational therapy evaluation as agreed by Brockton was reserved.
10. As a result of an alleged assault and battery against another student, Eagleton School terminated Student's placement at Eagleton on or about May 2012.
11. On May 10, 2012, Parent emailed Olga Garriga (Out of District Coordinator in Brockton) requesting an "emergency Team meeting" to discuss a new day placement for Student and transportation to said placement.
12. A document dated May 23, 2012, written by Parent and addressed to Ms. Garriga requested an emergency Team meeting and invoked Student's stay-put rights at Eagleton School. Parent also alleged that Brockton, Eagleton School and DYS had failed to coordinate services and make recommendations for Student as well as develop an appropriate IEP inclusive of transitional services and include family counseling. Parent alleged that DYS had terminated Student's placement at Eagleton without conducting the proper investigations and meetings.⁷
13. Ms. Garriga responded via email dated May 23, 2012, communicating Brockton's willingness to identify a new school placement for Student and proposing the following action:
 - a. You will need to sign a release of records (attached) giving us permission to send [Student's] IEP, latest progress reports, report cards and evaluations to the proposed program (Southeast Alternative was mentioned as a program [Student] is interested in returning to. We are open to discussing other possible day school programs.)
 - b. Upon receipt of consent, we will send out the referral to the identified school(s) looking for immediate placement.

⁷ Parent had previously made these requests via email addressed to Olga Garriga, Tami Joia (former advocate for the family) Maureen Pryma and Debbie Brown of Eagleton School.

- c. You and [Student] will need to visit the program and complete the Interview/ admission process.
 - d. We propose June 1 at 1:00 p.m. at the Crosby Administration Building for a placement meeting. Hopefully by this time, we will have made some head way in identifying the next appropriate school program.
 - e. We will reconvene the Team to develop a new IEP on June 12, 2012 (as previously proposed) ensuring staff from [Student's] newly identified school placement as well as Eagleton staff are present to participate in the Team.
14. Via email to Ms. Garriga on May 25, 2012, Parent requested reimbursement for transporting Student back and forth to Eagleton and restated her request that Student's IEP reflect reimbursement for transportation as well as family counseling services. Via separate email the same day, Parent again invoked Student's stay-put rights and submitted a consent form for Brockton to send out referral packets.
15. A copy of Mapquest calculating the distance between Parent's home and Eagleton School estimates the distance to be 303.55 miles in each direction, and estimates the travel time to be five hours and twenty-four minutes.
16. On June 12, 2012, Parent wrote to Brockton requesting that she be reimbursed \$3,870.20 (7,588.75 miles x 0.51¢ per mile) for transporting Student between Eagleton School and the home in November and December 2011, and January, February, April, March and May 2012. The document states that Parent had made this request to Brockton and to the Department of Youth Services several times before.
17. On June 22, 2012, Parent dropped off toll receipts regarding transportation of Student to and from Eagleton School. On behalf of Brockton, Attorney Mary Joanne Reedy responded on June 25, 2012 stating

I understand that you have delivered documentation regarding your claim to reimbursement for transportation to the Brockton Public Schools and DYS. I have a call into DYS to see what its position is –as you know, neither BPS personnel nor I can speak for DYS. With regard to any claim against Brockton, I believe that it is quite limited – as Brockton did not make the residential placement at Eagleton, nor did Brockton have any role in the decisions or timing of home visits by your son. Our view is that Brockton would be willing to reimburse for 3 round trips relating to visits for school vacations in December 2011 and February and April 2012. We cannot verify the number of other visits, or whether your provision of transportation was at DYS request. We are awaiting further information from DYS to finalize Brockton's position on this matter.

18. On June 26, 2012, Parent communicated to Brockton her intention to file a Request for Hearing regarding: transportation issues; failure to hold Team meetings; failure to include factual; actual updated information in the IEP; denying Parent's request for family counseling to be included in the IEP; failure to conduct evaluations; and, failure to modify Student's IEP consistent with evaluations. Parent's Hearing Request was filed on August 22, 2012.
19. On September 25, 2012, a BSEA Order was issued scheduling the Hearing in this matter for November 28 and 29, 2012 at DALA/BSEA, One Congress St, 11th floor, Boston, MA.
20. To date the BSEA has not received any document from Parent clarifying the issues for the Hearing scheduled to begin in approximately two weeks.

DISCUSSION

This Ruling is issued in consideration of all of the documents submitted by the Parties to date, including Parent's Request for Hearing and Amended Request for Hearing, Brockton's Response, their arguments and other submissions as described in the Procedural Background section of this Ruling. Administrative notice of the Decisions in *BSEA #11-3408* and *BSEA #12-4761*, was also taken.

The BSEA has jurisdiction over "any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities."⁸

The BSEA Hearing Rules and the Standard Adjudicatory Rules for Practice and Procedure⁹ authorize the Hearing Officer to dismiss a case if the party requesting the appeal fails to state a claim on which relief can be granted.¹⁰ Similarly, both the Federal and Massachusetts Rules of Civil Procedure provide that a motion to dismiss can be granted when a party fails to state a claim on which relief can be granted.¹¹

For a complaint to survive a motion to dismiss, it must contain factual allegations that "raise a right to relief above the speculative level."¹² The hearing officer will accept all factual

⁸ 603 C.M.R. 28.08(3)(a).

⁹ 603 C.M.R. 28.08(5)(b) ("Except as provided otherwise under federal law or the in the administrative rules adopted by the Bureau of Special Education Appeals, hearings shall be conducted consistent with the formal Rules of Administrative Procedures contained in 801 C.M.R. 1.00.").

¹⁰ BSEA Hearing Rule XBII(B)(4) ("Any party may file a motion or request to dismiss a case for . . . failure to state a claim upon which relief can be granted"); 801 C.M.R. 1.01(7)(g)(3) ("The Presiding Officer may at any time, on his own motion or that of a Party, dismiss a case . . . for failure of the Petitioner to state a claim upon which relief can be granted").

¹¹ FED. R. CIV. P. 12(b)(6); MASS. R. CIV. P. 12(b)(6).

¹² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

allegations “as true and draw all reasonable inferences in the plaintiff’s favor.”¹³ Legal conclusions, however, will not be entitled to a presumption of truth. While legal conclusions may “provide the complaint’s framework, they must be supported by factual allegations.”¹⁴ The question on a motion to dismiss is not a matter of whether the plaintiff will prevail, but rather if the plaintiff should be given an opportunity to offer evidence in support of his claims.¹⁵

In its *Motion to Dismiss/In Limine*, Brockton seeks to prevent Parent from relitigating the factual and legal conclusions and claims reached in the previous BSEA proceedings. Additionally, Brockton seeks dismissal of any claims that may be premature because of conditions that are yet to be met. Brockton states that “any claims relative to substantive IEP issues which cannot yet be addressed as the evaluations ordered by the Hearing Officer in [BSEA] #12-4671, as a precondition to adjudicating those issues, have not been completed due to the unavailability of [Student], whose whereabouts are unknown”.

Additionally, Brockton argued that Parent had not yet submitted a statement of her current issues and therefore, she should not be allowed to proceed on “unspecified claims.”

For purposes of this Motion to Dismiss/In Limine, Brockton carries the burden of persuasion pursuant to *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).¹⁶

In order to address the Parties’ specific arguments, I begin by discussing Brockton’s main challenges before turning to Parent’s claims. Brockton’s main allegations involve the following arguments: a) that Parent is collaterally estopped from asserting claims or relitigating facts addressed in previous BSEA Hearings; b) the ripeness of some of Parent’s claims; and, c) the impact on Brockton’s of Parent’s failure to provide a revised statement of issues for Hearing. The legal foundation regarding Brockton’s arguments is also provided in each section.

¹³ *Doe v. Boston Public Sch.*, 560 F.Supp.2d 170, 172 (D.Mass. 2008). See also, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (“To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical . . . It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”); *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (“Non-conclusory factual allegations in the complaint must then be treated as true, even if seemingly incredible.”).

¹⁴ *Ashcroft*, 129 S. Ct. at 1940.

¹⁵ *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1419 (3d Cir. 1997). See also, *L.X. ex rel. J.Y. v. Bayonne Bd. of Educ.*, No. 10-05698, 2011 U.S. Dist. Lexis 32952 (D.N.J. Mar. 29, 2011) (citing *Burlington*); *Doe*, 560 F.Supp.2d at 172 (“If the facts in the complaint are sufficient to state a cause of action, a motion to dismiss the complaint must be denied.”); *Ocasio-Hernandez*, 640 F.3d at 12 (“In short, an adequate complaint must provide fair notice to the defendants and state a facially plausible legal claim.”); *Sepulveda-Villarini v. Dep’t of Educ. of Puerto Rico*, 628 F.3d 25, 29 (1st Cir. 2010) (“The make-or-break standard . . . is the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief.”).

¹⁶ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (“[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief”).

A. Whether Parent is collaterally Estopped from Asserting Claims or Relitigating Facts already Decided in BSEA #11-3408 and BSEA #12-4761:

Brockton argues that through Parent's Hearing Request and Amended Hearing Request, she is attempting to raise issues that were already addressed in previous BSEA Hearings. Specifically, Brockton states that Parent is again attempting to reach back in time by claiming that the IEP proffered by Taunton Public Schools following the March 2010 Team meeting calling for residential placement of Student constitutes Student's "stay-put" placement consistent with the IDEA. At the time this IEP was developed, Student was a resident of Taunton, Massachusetts. Similarly, Parent raises claims regarding evaluations and some transportation issues which in one way or another, as explained later in this Ruling, were addressed in previous Hearings. Brockton is correct that many of these arguments were unsuccessfully raised by Parent in BSEA #11-3408 and BSEA #12-4761 (See Ruling on Motion for Stay Put in BSEA #11-3408 and Facts #12 through 19 in BSEA #12-4761.)

The doctrine of collateral estoppel is designed to ensure the finality of judgments. It provides that when a final determination is entered (such as that provided through a BSEA decision), regarding an issue of fact or law, the parties are precluded from raising those issues again in subsequent matters regardless of whether the new matter involves the same or a different claim. See *Jarosz v. Palmer*, 436 Mass 530-531, 766 N.E.2d 482 (2002), citing to *Martin v. Ring*, 401 Mass. 59-61, 514 N.E.2d 633 (1987), quoting *Fireside Motors, Inc., Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 372, 479 N.E.2d 1386 (1985). The court in *Alba v. Raytheon Co.*, 441 Mass. 836, 840-843 (2004), noted that

...when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *Alba v. Raytheon Co.*, 441 Mass. 836, 840-843 (2004); *Martin v. Ring*, 401 Mass. 59-61, 514 N.E.2d 633 (1987), quoting *Fireside Motors, Inc., Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 372, 479 N.E.2d 1386 (1985).

As explained in *Martin v. Ring*, the purpose of collateral estoppel is

To conserve judicial resources, to prevent the unnecessary costs associated with multiple litigation, and to ensure the finality of judgments. *Martin v. Ring*, 401 Mass. 59-61, 514 N.E.2d 633 (1987).

The BSEA has the legal authority to adjudicate special education issues in Massachusetts and to issue the final agency determination. 603 CMR 28.08(3) delineates the jurisdiction of the BSEA and 603 CMR 28.08(5) the powers of the hearing officer, stating that

In order to provide for the resolution of differences of opinion among school districts, private schools, parents, and state agencies, the Bureau of Special Education Appeals, pursuant to G.L. c.71B, §2A, shall conduct mediations and hearings to resolve such disputes. The jurisdiction of the Bureau of Special Education Appeals over state agencies, however, shall be exercised consistent with 34 CFR §300.154(a)... 603 CMR 28.08(3).

... to reach a fair, independent, and impartial decision based on the issues and evidence presented at the hearing and in accordance with applicable law. 603 CMR 28.08(5)(c).

As such, it is clear that in Massachusetts, the BSEA has been granted the necessary authority to resolve special education issues and its decisions constitute final agency review.

To ascertain whether a party may raise defensive collateral estoppel, the guiding principle is whether the party against whom it is asserted “lacked full and fair opportunity to litigate the issue in the first action or [whether] other circumstances justify affording him an opportunity to relitigate the issue” *Martin v. Ring*, at 62, 514 N.E.2d 663, quoting *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 541, 476 N.E.2d 595 (1985). Brockton argues that Parent has raised the issue of stay-put in numerous related administrative proceedings, two of which, within this past year and a half, involved Brockton. Brockton seeks a final ruling that Parent already had the proverbial “bite at the apple” and the record supports a finding that Parent had an opportunity to raise and litigate many of the issues she continues to raise in the instant case.

B. Whether any remaining substantive claims are not ripe (ready) to be litigated until Brockton has completed the evaluations and IEP process ordered in BSEA #12-4761.

Brockton states that since it has not had an opportunity to conduct the evaluations ordered on June 27, 2012 in *BSEA #12-4761* and therefore, it argues that it is premature to determine if, and/ or how, the goals and objectives in Student’s IEP may need to be modified to address Student’s current educational needs.¹⁷ The Decision in *BSEA #12-4761* was issued the end of June 2012, after the close of the school year. Student, who is nineteen years old, refused educational services during the summer, and has been by Parent’s account, “on the run” since August 2012, and unavailable to participate in any assessment, evaluation or the IEP process. Thus, Brockton moves to dismiss Parent’s claims to the extent that they may involve the substantive appropriateness of Student’s IEP.

C. Whether Parent’s failure to Provide a Statement of Issues, as directed by the Hearing Officer, Prejudices Brockton.

¹⁷ In *BSEA #12-4761*, Parent asserted that Brockton had failed to conduct adequate evaluations and assessments regarding Student’s academic achievement and transition needs while Brockton contended that it continued to offer to conduct them. Brockton was ordered to complete the evaluations and convene the Team “prior to any BSEA proceeding regarding substantive IEP issues”.

According to Brockton, Parent's Hearing Request is an "amalgam of old claims and grievances" against Brockton and other state agencies and different school districts. Brockton argues that until Parent has clearly stated the issues actually "alive" in this current proceeding, Brockton is substantially prejudiced in preparing the case for Hearing. Furthermore, lack of clarity will unnecessarily waste public resources, time and administrative effort. Also, it will divert the time of school personnel and DYS personnel who have been called to testify without clear direction or focus.

ANALISYS

Brockton is correct that as to the claims and issues already litigated in previous BSEA Hearings, raising them again, even for historical and/ or chronological purposes, is not only precluded by the doctrine of collateral estoppel, but also utterly redundant. Similarly, since Brockton has been unable to complete the evaluations it was ordered to complete in *BSEA #12-4761*, some of Parent's claims are simply not ripe, as explained later in this Ruling.

Brockton is also correct that Parent was instructed to review the previous Decisions issued in the cases involving her son, heard at the BSEA between January and June 2012, and submit an updated list of issues not addressed by the decisions in those cases. Parent is correct that the Orders issued immediately after the conference calls did not specifically order her to do so. Given that Parent is pro-se and that little time is left between now and the dates assigned for Hearing, I have reviewed Parent's Hearing Request, Amended Hearing Request and previous BSEA Decisions in *BSEA #11-3408* and *BSEA #12-4761* in an attempt to help Parent clarify the issues and claims which may still be pending. The result is a narrowing of the scope of the Hearing as explained below. Parent is ordered to submit further clarification of her claims by the close of business on Monday November 19, 2012, to the extent that she believes that the Hearing Officer may have misunderstood any of her current viable claims. Parent is reminded that at Hearing she will carry the burden of proof with regard to all of her claims.

In her Motion Objecting to *Brockton's Motion to Dismiss/ In Limine and to Determine the Scope of Hearing* Parent argued that her Request for Hearing was clear and outlined the Hearing issues as follows:

1. Whether Parent's Request for Student's IEP to include transportation (provision or reimbursement) were ignored by Brockton.
2. Whether Brockton's IEP for Student was reasonably calculated to offer Student a FAPE.
3. Whether Brockton violated Student's/ Parent's procedural due process rights in failing to communicate with Parent.
4. Whether Brockton failed to conduct a Functional Behavioral Assessment of Student after his continuous violations of his program, the rules and despite discipline reports.
5. Whether Brockton violated Student's/ Parent's procedural due process rights in failing to convene Student's Team to discuss behavioral issues.

6. Whether Brockton violated 34 CFR 300.530, 300.536, 300.101 and 300.504.

Issue #1:

The reimbursement for transportation issue argued by Parent in *BSEA #12-4761* related to Parent travelling to Eagleton to participate in family counseling, not transportation of Student for home visits as is the case here. Parent's right to raise transportation issues at a later time was reserved as delineated in footnote #10 in *BSEA #12-4761*,

Transportation issues were raised by Parent in her original Hearing Request although relating transportation for Parent not Student. Parent's right to raise this issue at a later time was reserved pending the result of evaluations and reconvening of the Team. Furthermore, the record lacks any information regarding the arrangements between Brockton and DYS relative to Student's placement. As such, any issues regarding Brockton's responsibility to provide transportation to Student and or to Parent relative to services required for the benefit of Student are not being considered in this Decision and are preserved for a later time.

In *BSEA #12-4761* the deferral of the issue of transportation reimbursement was due to the fact that Brockton had to complete the evaluations ordered in *BSEA #12-4761*, then convene the Team and if at that point, the Team recommended family services but failed to agree to transportation reimbursement for Parent, then Parent's claim for transportation for this issue would be viable. Since Brockton has not been able to complete the evaluations given that Student's whereabouts are unknown, this claim continues not to be ripe and as such, Parent's right to raise this issue *after* the aforementioned conditions have been met continues to be reserved consistent with the Decision in *BSEA #12-4761*.

However, Parent's transportation claim in the instant case is a different one. At present, Parent is requesting reimbursement for transportation of Student for home visits in late 2011 and 2012. This claim is viable and has not been the subject of previous Hearings. As such Parent is not collaterally estopped from pursuing this claim at Hearing. Brockton's Motion to Dismiss as to issue #1 as defined *infra* is DENIED.

Issue #2:

The issue as to whether Brockton's IEP for Student was reasonably calculated to offer Student a FAPE was addressed in two previous BSEA Hearings. The Decision in *BSEA #12-4761* made it clear that until Brockton completes all the evaluations, and the Team is convened to review the results and amend the IEP, any claim addressing substantive issues regarding the appropriateness of Student's IEP are premature. Brockton however, shall use due diligence in completing the evaluations as soon as Student is located and assuming Student's cooperation in participating in the evaluations.

Since the aforementioned claims are not ripe, these claims are Dismissed Without Prejudice. Brockton's Motion to Dismiss as to issue #2 is GRANTED.

Issue #3:

Parent next raises the issue of whether Brockton violated Student's/ Parent's procedural due process rights in failing to communicate with Parent. To the extent that Parent's allegation involves Student's termination from Eagleton and any other alleged procedural violation post April 2012, Parent's claim may proceed. When the most recent Decision in a case between the Parties was issued, Student was enrolled at and attending Eagleton School as a residential student, pursuant to a DYS placement. *BSEA #12-4761* did not involve Student's termination from Eagleton or any subsequent events or placements, proposed or implemented. Therefore, any alleged procedural violation as a result of failure to communicate with Parent is viable. Parent's allegations in this regard are limited to events and any alleged misconduct occurring post April 2012.

Regarding issue #3, Brockton's Motion to Dismiss and *In Limine* is GRANTED in Part.

Issue #4:

Parent alleged that Brockton had failed to conduct a Functional Behavioral Assessment of Student after his continuous violations of his program, the rules and despite discipline reports. Assuming that Parent is referring to Student's termination from Eagleton School and or any subsequent program, Parent's claims are not precluded by collateral estoppel and may be heard. Any factual evidence in this regard is limited to incidents that may have occurred following Student's placement by DYS at Eagleton School.

Regarding issue #4, Brockton's Motion to Dismiss and *In Limine* is GRANTED in Part.

Issue #5:

As with issue #4 *supra*, Parent's allegation that Brockton violated Student's/ Parent's procedural due process rights in failing to convene Student's Team to discuss behavioral issues following Student's placement at Eagleton School was not part of *BSEA #12-4761* and may proceed. Parent is reminded that no evidence prior to Student's attendance at Eagleton will be allowed as those facts and issues were already heard as part of *BSEA #11-3408* and *BSEA #12-476*. Parent's recourse in those cases was to appeal the BSEA Decisions within ninety (90) days of issuance of the Decisions to state or federal district court for the District of Massachusetts.

Regarding issue #5, Brockton's Motion to Dismiss and *In Limine* is GRANTED in Part.

Issue #6:

Parent also raised violations of 34 CFR 300.530, 300.536, 300.101 and 300.504. She however, failed to specifically state what factual allegations she was referring to, and a review of her submissions is of no further assistance. To the extent that her allegations are the same raised in previous Hearings by her advocate, these claims are precluded by collateral estoppel. If Parent's allegations involve new transgressions post April 2012, and if Parent submits an explanation of what specific transgression she is alleging by the close of business on Monday November 19, 2012, the new claims may be heard at Hearing.

Regarding issue #6, Brockton's Motion to Dismiss and *In Limine* is GRANTED in Part.

As such, the scope of the Hearing in the instant case is limited as described *supra*.

Lastly, regarding Parent's request for postponement of the Hearing, Parent has known since September 25, 2012, that the Hearing would take place in late November 2012. Since Parent has participated in other hearings at the BSEA in the past two years, she is aware that depending on the number of issues the Hearings may take all day or multiple days. The Hearing is scheduled to proceed at 10:00 a.m., which means that she is able to take her daughter to school in the morning before attending the Hearing and can make arrangements for her daughter to be taken home after school on the one or two days of hearing. Similarly, she can make arrangements for her dogs to be walked by a neighbor, friend or dog-walker. Furthermore, the physician's note provided by Parent regarding her daughter's father, indicates that he injured his lower-back in the summer of 2012 and states that he is unable to work due to lower back pain, not foot surgery. The note disables him from work for one month following November 5, 2012. Parent's request for postponement is not persuasive and therefore, her request for postponement is **DENIED**. The Hearing will proceed on November 28 and 29 (if a second day is needed), 2012, as previously scheduled, as to the issues surviving Brockton's Motion to Dismiss, consistent with this Ruling.

ORDER

Brockton's *Motion to Dismiss/ In Limine* is ALLOWED in Part consistent with this Ruling. The Hearing is limited to the claims as allowed to proceed in this Ruling and only factual information pertaining to those and post Student's entrance to Eagleton (to the extent that it is new information not already addressed in either *BSEA #11-3408* and *BSEA #12-476*, or at any other BSEA proceeding).

Parent is ordered to submit further clarification of her claims by the close of business on Monday November 19, 2012.

The claims not dismissed will be heard on November 28 and 29 (if a second day is needed), 2012, at 10:00 a.m., consistent with the Order issued on September 25, 2012. The Parties are reminded that exhibits (prepared consistent with Rule IX. B of the *Hearing Rules for Special Education Appeals*) and witness lists are due by the close of business on November 21, 2012.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Date: November 15, 2012